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8 March 1984

MEMORANDUM FOR: Deputy Director for Administration
Director of Security
Chairman, SECOM
C/L&LD/OGC
C/ALD/OGC

FROM:

Chief, Legislation Division

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SUBJECT: Redraft of H.R. 4681, the Federal Polygraph
Limitation and Anti-Censorship Act of 1984

1. Attached is a redraft of H.R. 4681, Representative Brooks' bill limiting the use of the polygraph and prepublication review requirements by federal agencies, which has been prepared by Andy Feinstein, Chief Counsel and Staff Director of Representative Schroeder's Subcommittee on Civil Service. Mark-up of the bill by the Subcommittee has been scheduled for 14 March 1984. I would appreciate your comments concerning this draft at the earliest practicable moment.

2. This new draft continues to provide an exemption for the Central Intelligence Agency (CIA) from the polygraph and prepublication prohibitions contained in Sections 7362 and 7363 of the bill. The exemption has been expanded to apply to "any individual employed by, or detailed to, the Central Intelligence Agency, or any individual applying for a position in the Central Intelligence Agency...."

3. With respect to the restrictions on polygraph use contained in Section 7362, the bill prohibits an agency, other than CIA or the National Security Agency (NSA), from requiring any employee or applicant for employment to submit to a polygraph examination, or taking any action against an employee or applicant who refuses to submit to such an examination. Specified agencies, including the CIA, may still administer polygraph examinations on a voluntary basis as part of a specific investigation into alleged criminal conduct. It is unclear given the present wording of subsection 7362(b) whether agencies are limited to administering such examinations only to their own employees, or whether, if an individual's consent is obtained, an agency also may polygraph employees of other agencies who are implicated in a criminal investigation.

4. With respect to prepublication review, Section 7363 provides that agencies, other than CIA or NSA, may not require an employee or applicant for employment to enter into an agreement which requires prepublication review, or take any action against an employee or applicant on the basis of that individual's refusal to sign such an agreement. The present draft also retains the provision requiring heads of agencies to rescind any prepublication review agreement in effect on the date the act takes effect. This provision for some reason is not contained in the prepublication review section (7363), but instead is inserted in the exemption provision at 7365(b). This is troublesome because the "agencies" which will be subject to this mandatory rescission provision are defined in such a manner so as to include this Agency. The Agency exemption contained in 7365(a) only applies to the prohibitions contained in Sections 7362 and 7363, thus creating the anomalous result that the Agency could require its employees to sign prepublication review agreements but must rescind all agreements in effect on the date the act takes effect. This defect could be cured by providing that the Agency exemption provided in subsection (a) of Section 7365 applies not only to Sections 7362 and 7363, but also to subsection (b) of Section 7365.

5. The attached revision has addressed certain of the Agency's concerns with the Brooks bill. Most notably, the Agency's exemption now applies to detailees, the damaging findings contained in the beginning of the Brooks bill questioning the reliability of the polygraph have been deleted, and Section 7 of the original bill which stated that the act did not constitute affirmation for prepublication review or polygraph usage not otherwise prohibited by the bill also has been deleted. The fact remains, however, that the Director of Central Intelligence's ability to protect intelligence sources and methods is still diluted since non-disclosure agreements containing prepublication review provisions can only be signed under this bill by employees of CIA and NSA. In light of this fact, we believe our proposed response to Mr. Feinstein concerning the Agency's position with respect to this revised bill should be that the Agency still strongly opposes the enactment of any legislation in this area and that while certain of the Agency's concerns have been addressed in the revision, a more reasonable solution which more adequately accommodates Intelligence Community concerns with the protection of national security information can be reached.

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Attachment

cc:

Liaison

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SWH:csH (8 March 1984)